

SERVICE DATE – AUGUST 19, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 30186

TONGUE RIVER RAILROAD COMPANY, INC.—RAIL CONSTRUCTION AND
OPERATION—IN CUSTER, POWDER RIVER AND ROSEBUD COUNTIES, MONT.

Decided: August 18, 2015

This decision grants a motion to require Tongue River Railroad Company, Inc. (TRRC) to supplement its discovery production.

BACKGROUND

TRRC seeks a Board license under 49 U.S.C. § 10901 for it to construct and for BNSF Railway Company (BNSF) to operate a rail line in southeast Montana.¹ The primary purpose of the proposed line is to transport low sulfur sub-bituminous coal from a planned coal mine at Otter Creek, Mont., currently in the state permitting process, and other possible future mines that might be developed in the Otter Creek and Ashland, Mont. area.

On October 16, 2012, TRRC filed a revised application for construction authority.² After the Board issued a decision requesting additional information, TRRC filed a supplemental application on December 17, 2012. In a decision served on January 8, 2013, the Board accepted TRRC's supplemental application for consideration. On April 2, 2013, the Board received three comments on the transportation merits of the application, including one from Northern Plains Resource Council and Wally McCrae/Clint McCrae, d.b.a. the Rocker Six Cattle Company

¹ For a more detailed discussion of the procedural history in this matter, see the Board's February 26, 2013 and September 10, 2014 decisions in this docket.

² TRRC's October 16, 2012 revised application proposed the construction of a rail line similar to one approved by the Board's predecessor agency in 1986. See Tongue River R.R.—Rail Constr. & Operation—in Custer, Powder River & Rosebud Cntys., Mont. (Tongue River I), FD 30186 (ICC served Sept. 4, 1985), modified (ICC served May 9, 1986), pet. for judicial review dismissed, N. Plains Res. Council v. ICC, 817 F.2d 758 (9th Cir. 1987). This earlier proposed line, however, was never built. In light of TRRC's renewed interest in pursuing a line similar to the Tongue River I line, the Board reopened the proceeding in a decision served on June 18, 2012 and requested that TRRC file a revised application.

(collectively, NPRC Parties or NPRC).³

On August 27, 2013, the Board granted in part NPRC's request to conduct limited discovery. NPRC served requests for production of documents on TRRC on September 13, 2013. On December 6, 2013, TRRC, with the assistance of two of its owners (Arch Coal, Inc. (Arch Coal) and BNSF), served responses to NPRC's discovery requests.

On January 13, 2014, NPRC filed a motion to compel discovery from TRRC, BNSF, and Arch Coal (collectively, TRRC Parties). NPRC wanted the TRRC Parties to provide additional answers to certain interrogatories and to produce additional documents in response to its document requests. In particular, NPRC asserted that it sought information to determine whether TRRC's owners are committed to financing and pursuing the rail construction project, whether the mine at Otter Creek would be a viable concern, and whether there is a demand for the coal to be hauled by the line in question. TRRC submitted a filing opposing the motion on February 3, 2014.

On September 10, 2014, the Board granted in part NPRC's motion to compel discovery. TRRC produced a majority of the required documents by December 31, 2014, and completed the final production of documents by January 13, 2015.

On December 30, 2014, during the course of TRRC's production of documents, NPRC filed the instant motion asking that the Board compel TRRC to supplement its document production pursuant to 49 C.F.R. § 1114.29(c). On January 20, 2015, TRRC replied in opposition to NPRC's motion.

DISCUSSION AND CONCLUSIONS

The motion to compel asserts that, in December 2014, NPRC learned that TRRC did not intend to produce any documents generated between September 13, 2013, the date that NPRC served discovery requests on TRRC, and September 10, 2014, the date the Board ruled on NPRC's January 13, 2014 motion to compel discovery. NPRC requests that the Board direct TRRC to supplement its document production for the period of September 2013 to September 2014. NPRC contends that supplementation is necessary because (1) the only information that NPRC is seeking has already been found to be relevant by the Board and the Board required TRRC to produce such documents; (2) the documents from September 2013 to September 2014 are not difficult for TRRC to locate, but would be difficult for NPRC to discover through deposition testimony; and (3) TRRC's failure to supplement its discovery responses puts NPRC at risk of relying on information obtained in discovery that TRRC would later claim is stale or outdated.

In its January 20, 2015 reply in opposition, TRRC argues that it did not supplement its

³ Other comments were filed by the United Transportation Union, General Committee of Adjustment (UTU/GO-386), and jointly by Montana Environmental Information Center, National Wildlife Federation, and Sierra Club.

production because Board regulations do not require it in these circumstances and that the requests were untimely. Specifically, TRRC contends that 49 C.F.R. § 1114.29 defines the limited circumstances under which a party must supplement its discovery responses: (1) if the discovery question relates to the identity of persons with knowledge of discoverable matters or information relating to expert witnesses, (2) if the party learns his prior response is incorrect, or (3) upon agreement of the parties or if ordered to do so by the Board. TRRC argues that the first two grounds are inapplicable, and that it should not be required to do so based on the third ground.

TRRC claims that NPRC's request for supplementation came at the end of the discovery period and was therefore too late. TRRC notes that NPRC did not seek supplementation at any point before December 2014. TRRC argues that for NPRC to seek supplementation at this juncture would be prejudicial and unduly burdensome to TRRC because it has already complied with the Board's September 2014 discovery order and the Board only provided for limited discovery in this proceeding. TRRC further contends that NPRC's concerns about TRRC's relying on information it refuses to produce are without merit.

NPRC's request that TRRC supplement the record is reasonable. The Board found that the documents for which discovery was granted in response to NPRC's motion to compel might contain relevant information, or information reasonably calculated to lead to the discovery of admissible evidence, for a period until September 2013. There is no reason that this same conclusion should not apply to documents for the period from September 2013 through September 10, 2014. While TRRC opposes TRRC's request for supplementation, it has not demonstrated that supplementation under the circumstances presented here would be unreasonably burdensome. Therefore, NPRC's motion will be granted and TRRC will be ordered to supplement its production through September 10, 2014, the date the Board issued its decision regarding NPRC's earlier motion.

TRRC shall complete supplementation of the record by October 19, 2015. NPRC may file a further supplemental submission 21 days following TRRC's supplementation. Jay L. Schollmeyer, on behalf of SMART-Transportation Division, General Committee of Adjustment (GO-386) (hereinafter SMART-386),⁴ may file a reply, to the extent permitted by a separate decision also being served today, 14 days after NPRC's submission. TRRC's reply to NPRC and to any SMART-386 submission will be due 21 days following the due date for the SMART-386 submission.

It is ordered:

1. NPRC's December 30, 2014 Motion to Compel Supplemental Document Production is granted.
2. The parties are directed to abide by the above procedural schedule.

⁴ Schollmeyer is the General Chairman for SMART-Transportation Division, the successor to the United Transportation Union.

3. The decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.